the Commission's antenna policies. Uniform standards imposed by the Commission will thus avoid the need for citizens to litigate such regulations at every turn. In short, a vast amount of unnecessary litigation will be avoided altogether.

Third, when litigation does occur, centralizing the disputes at the Commission will minimize the burden on consumers. Because the Commission's proceedings are primarily "paper hearings," the costs will be far lower than those associated with a court battle, which can involve numerous court appearances, substantial formal discovery, motions practice and, ultimately, a trial. Moreover, while the Commission will need to be presented with the facts, it will not need to be educated with respect to the law. By contrast, there are thousands of courts across the nation, each of which might well be confronting the preemption issue for the first time and, therefore, will need to learn anew about this law. Indeed, state and district courts could never bring the same level of expertise to bear that can be expected from the Commission. Particularly after precedent has been established at the Commission by a few rulings in this area, the Commission staff will be able to act expeditiously and with a minimum of burden imposed on the resources of the Commission or its staff.

To implement exclusive jurisdiction, the Commission should add a new paragraph (d) to its proposed rule as follows:

> (d) The sole forum for adjudicating any matters arising under this section shall be with the Commission.[38/]

[38/]Obviously, this amendment is not intended to, nor could it, remove the right to appeal decisions of the Commission as provided by 47 U.S.C. § 402.

The Commission should also conform paragraph (a)(1) of its preemption rule by removing the "or a court of competent jurisdiction" language.

D. The FCC Should Adopt Its Proposed Per Se Rule For Private, Nongovernmental Restrictions.

In the *NPRM*, the Commission proposes a *per se* preemption rule for private nongovernmental restrictions on wireless cable and television broadcast antennas. WCA supports the proposal and urges the Commission to adopt proposed paragraph (c).

Adoption of a *per se* preemption of private, nongovernmental restrictions will implement the clear Congressional intent of Section 207. The House Committee Report language accompanying the statutory provision upon which Section 207 of the 1996 Act was based explicitly states:

> The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae . . . Existing regulations, including . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.[39/]

The proposed rule is also essential to effectuate the federal interest in ensuring consumer access to wireless cable service. Wireless cable consumers -- both potential and existing -- are plagued by restrictive covenants and HOA rules that are equal or broader in scope and force to their government-imposed counterparts in impairing their ability to receive service. By virtue of private restrictions, potential wireless cable subscribers are confronted with countless delays, harassment, unreasonable costs, prior written approval requirements

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[39/]H.R. Rep. No. 204 at 123-24 (emphasis supplied).

(with approval rarely given), and, all too often, outright bans against the installation of wireless cable antennas. It is unclear precisely how many restrictive covenants and HOA rules restrict wireless cable antennas. What is clear, however, is they exist in spades.

The 1996 Act is intended to eliminate just these types of scenarios. To implement the 1996 Act's directives and to enable homeowners to receive wireless cable signals without first engaging in protracted disputes with their HOAs, the Commission should, in response to its *NPRM*, adopt proposed paragraph (c).[40/]

E. Receive-Only Antennas May Not Be Regulated On Health Grounds.

The Commission acknowledges in the text of its *DBS Order and FNPRM* that receive-only antennas do not emit radiation and, therefore, a local ordinance "could not use RF emission hazard concerns as a basis to regulate receive-only antennas."[41/] The Commission's rule should likewise remove the opportunity for local authorities to restrict receive-only wireless cable antennas based on alleged RF radiation concerns, the only purported health concern even raised in the record. Specifically, the Commission's rule should be clear that

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[40/]In his Separate Statement, Commissioner Quello raised concern that proposed paragraph (c) would ban a restrictive covenant that regulated the placement of a reception antenna, but did not impair the ability of the homeowner to receive service. As WCA reads proposed paragraph (c), Commissioner Quello's fears should be allayed — by its terms the proposed rule is limited to those situations where the ability to receive wireless cable or television broadcast service is impaired.

[41/]*DBS Order and FNPRM*, at ¶ 35; *see also id.* at ¶ 52 ("we are not aware of any reasonable health concerns associated with installation of receive-only antennas that do not emit radiation").

there is no legitimate "health" objective that would justify precedence of a local or state law over federal regulations with respect to receive-only antennas.

With respect to the new generation of transmitting antennas that wireless cable operators will be deploying as they move into interactive services, the Commission should clarify that only "true" RF regulation is permitted, not regulations or bans on transmitting antennas masquerading as RF regulations. Without such a limitation, the Commission's preemption policy is in danger of being undermined by regulations that are hidden in the folds of the cloak of RF radiation regulation.

F. Waivers Should Be Available Only If The Regulation Is Essential To Preserve Some Uniquely Local Interest And Is No Broader Than Necessary.

In order to effectively enforce its new preemption rule, the Commission should minimize the ways in which some local authorities might attempt to circumvent the rule. Specifically, the Commission should delineate clearly the scope of its waiver rule. The current rule permits the Commission in its sole discretion, to grant a waiver if the applicant can demonstrate "local concerns of a highly specialized nature." WCA suspects and fears that some local authorities, absent guidance from the Commission, will attempt to interpret "local concerns" in too broad a fashion. That result would disserve the public interest. The Commission would be inundated with inappropriate applications for waivers. And wireless cable subscribers, as discussed above, would be forced either to oppose such applications if they want to preserve their federally ensured right to receive wireless cable service or to surrender and subscribe to another type of service.

To avoid this result, the Commission should further define the parameters of its waiver rule by replacing "local concerns of a highly specialized or unusual nature" in the second sentence of proposed paragraph (b) with the following:

> (i) the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and (ii) the physical boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature.

The Commission should also clarify in the text of its order that in determining whether a regulation is "essential," it will look to the regulation of not only wireless antennas, but also other similar structures. If a local authority does not regulate or restrict other structures posing similar health and safety risks, it is difficult to perceive how regulation or restriction of wireless cable antennas is "essential" to preserving or protecting the local interest at issue.

This proposed language will have a number of beneficial effects. Potential wireless cable subscribers will not bear the prospective burden of opposing a multitude of waiver requests and thus will be better to subscribe to service if they so desire. This, in turn, will serve the federal interests discussed at length above. In addition, the proposed waiver rule will provide guidance to local authorities seeking to comply with the Commission's preemption policy. Further, because the scope of allowable waivers is substantially more explicit, it will stem the tide of frivolous waiver applications to the Commission, thereby reducing the Commission's workload.

G. No Liability May Be Assessed For Actions to Install An Antenna Prior To A Final Commission Decision.

As discussed above, potential wireless cable subscribers will be hesitant to subscribe to this alternative video programming service if they are uncertain whether installation of a reception antenna will result in litigation and potential liability. If the federal interest in ensuring the availability of wireless cable as a competitive communications service provider is to be preserved, consumers must be able to install wireless cable reception antennas when they want to start receiving service, not after the local authority has fully adjudicated the validity of its antenna regulation. And, importantly, consumers must be able to do so without fear of penalty even if they ultimately lose the battle -- unless the Commission has already ruled that the specific restrictive ordinance in question is legal.[42/]

The Commission's proposed prohibition against any direct action against a consumer under paragraph (a)(1) of its proposed rules, unless the locality first obtains a waiver or rebuts the presumption of unenforceability, evidences that the Commission does not want to dissuade consumers from installing wireless antennas. But, the proposed language is neither broad enough nor specific enough to protect consumers adequately and promote the federal interests.

[42/]WCA does not intend that homeowners who install antennas in direct defiance of a local regulation that has been upheld by the Commission should not be subject to liability. Once a locality has successfully tested its regulation with the Commission (by receiving a waiver), the local authority would be justified in vigorous enforcement of its law.

In the *DBS Order and FNPRM*, the Commission stated that antenna owners will not be liable retroactively for noncompliance with any local regulation during the pendency of any adjudication.[43] While the same should perforce hold true for consumers battling restrictions on wireless cable antennas, the proposed rule does not make this clear.

Moreover, the Commission has given no grace period for the wireless cable subscriber to bring its installation into compliance, nor has it required local authorities to provide residents of notice of a determination that a restriction has been approved by the Commission. Once a local authority has been granted a waiver or, if available, rebutted the presumption of unenforceability, it should be required to afford at least 30 days notice to any party against whom it intends to enforce the regulation. Penalties should not be permitted to accrue during this period. Otherwise, consumers concerned about possible enforcement action will gravitate towards the "safer" service — the franchise fee-paying local cable system.

To avoid this result, WCA proposes that the end of proposed paragraph (a)(1) be amended as follows:

> No promulgating authority may enforce a regulation that affects the installation, maintenance or use of such devices or impose any penalties pursuant thereto until 30 days after it has provided written notice that such regulation has been authorized by the Commission to the person against whom it wishes to enforce the regulation.[44]

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[43] *See DBS Order and NPRM*, at ¶ 31, n.68.

[44] A similar policy must, of course, apply to HOA restrictions if the Commission decides to retreat from its proposal to treat HOA restrictions as *per se* preempted. Potential wireless cable subscribers must be able to install antennas without fear of liability in the event the HOA ultimately prevails in enforcing any restriction.

III. CONCLUSION.

For all the reasons set forth above, including in particular the dictates and underlying policies of the 1996 Act, the Commission should take the actions described above in response to its *NPRM*.

Respectfully submitted,

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May 6, 1996

APPENDIX A

PROPOSED RULE

(a) (1) Any state or local zoning, land-use, building, or similar regulation, that ~~affects~~ **impairs** the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service ~~shall be presumed unreasonable and~~ is ~~therefore~~ preempted ~~subject to paragraph (a)(2)~~. No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation ~~covered~~ **that affects the installation, maintenance, or use of such devices** ~~by this presumption~~ **until** ~~unless~~ the promulgating authority has obtained a waiver from the Commission pursuant to paragraph ~~(c)~~**(b)**, or a final declaration from the Commission ~~or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (b)(2)~~ that such regulation does not impair the installation, maintenance, or use of such devices. **No promulgating authority may enforce a regulation that affects the installation, maintenance or use of such devices or impose any penalties pursuant thereto until 30 days after it has provided written notice that such regulation has been authorized by the Commission to the person against whom it wishes to enforce the regulation.**

~~(2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:~~

~~(A) is necessary to accomplish a clearly defined health or safety objective that is stated in the test of the regulation itself;~~

~~(B) is no more burdensome to television broadcast service or multichannel multipoint distribution service reception device users than is necessary to achieve the health or safety objective; and~~

~~(C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service.~~

(b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the

Commission in its sole discretion, upon a showing by the applicant of ~~local concerns of a highly specialized or unusual nature~~ **(i) the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and (ii) the physical boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature.** No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.

(c) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or multichannel multipoint distribution service.

(d) The sole forum for adjudicating any matters arising under this section shall be with the Commission.